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IN THE

Supreme Court of the United States

October Term, 1973

No. 72-6160

LAWRENCE MITCHELL,
Petitioner,

v.

W.T. GRANT COMPANY,
Respondent.

RESPONDENT'S BRIEF

THOMAS J. O'SULLIVAN
14 Wall Street
New York, New York 10005

MARSHALL J. FAVERET
527 Hibernia Bank Building
New Orleans, Louisiana 70112

Attorneys for Respondent

Of Counsel:
ANTHONY A. SANTA BARBARA
WHITE & CASE

FAVERET AND FAVERET

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LAWRENCE MITCHELL,

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W.T. GRANT COMPANY,

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RESPONDENT'S BRIEF

Opinions Below

The opinion of the Supreme Court of the State of Louisiana (App. 22-31) and the opinion concurring in part and dissenting in part (App. 32-35) are reported at 263 La. 627, 269 So. 2d 186 (1972). The decision of the Court of Appeal for the Fourth Circuit of the State of Louisiana (App. 20-21) is not reported. The judgment (App. 17) and the reasons for judgment (App. 18-19) of the First City Court for the City of New Orleans are also unreported.

Jurisdictional Statement

Petitioner purports to base jurisdiction of this Court to review the decision of the Supreme Court of the State of Louisiana by writ of certiorari upon 28 U.S.C. §1257(3). See Argument II (pp. 19-27, *infra*), for a further discussion in this regard.

Constitutional and Statutory Provisions Involved

Article 3227 of the Louisiana Civil Code provides in relevant part:

> "He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser.
>
> "So that although the vendor may have taken a note, bond or other acknowledgment from the buyer, he still enjoys the privilege." La. Civ. Code Ann. art. 3227 (West 1952)

Article 3501 of the Louisiana Code of Civil Procedure provides:

> "A writ of attachment or of sequestration shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.
>
> "The applicant shall furnish security as required by law for the payment of the damages the defendant may sustain when the writ is obtained wrongfully." La. Code Civ. Proc. Ann. art. 3501 (West 1961)

Article 3506 of the Louisiana Code of Civil Procedure provides:

> "The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued. If the writ of attachment or of sequestration is dissolved, the action shall then proceed as if no writ had been issued.
>
> "The court may allow damages for the wrongful issuance of a writ of attachment or of sequestration on a motion to dissolve, or on a reconventional demand. Attorney's fees for the services rendered in connection with the dissolution of the writ may be included as an element of damages whether the writ is dissolved on motion or after trial on the merits." La. Code Civ. Proc. Ann. art. 3506 (West 1961)

Article 3571 of the Louisiana Code of Civil Procedure provides:

> "When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." La. Code Civ. Proc. Ann. art. 3571 (West 1961)

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Should the Court entertain this case and overturn a centuries-old Louisiana sequestration statute on the basis of a confused and otherwise patently inadequate record?

2. Where it has already been judicially determined after notice and hearing that respondent was, in fact, entitled to the sequestration of petitioner's goods, after petitioner conceded he had no valid defenses as to the sequestration, has petitioner's case regarding his claimed right to continued possession not been mooted?

3. Was the Supreme Court of Louisiana not correct in determining that the rule in *Fuentes* should not be extended in this case to the Louisiana law of sequestration, where the activities of the State have occurred only after review of the case by an impartial judicial officer, and upon a showing of special need for expeditious action?

Statement of the Case

Petitioner, Lawrence Mitchell, a resident of the City of New Orleans, Louisiana, over a two-year period of time purchased a refrigerator, a stove, a used stereo, and a washing machine (Appendix, hereinafter "App.", 3) from respondent, W. T. Grant Company. As of February 2, 1972, having paid less than one-quarter of his total principal obligation on these purchases, petitioner owed W. T. Grant Company a balance of $574.17, which sum was unpaid and past due (App. 3).

On that date, because petitioner was in severe financial difficulty (App. 18) and was in default on the payment of the purchase price (App. 3), respondent commenced a suit seeking recovery of the amount which petitioner had contracted to pay. The litigation was commenced in the First City Court for the City of New Orleans by the filing of a petition seeking a judgment in the amount of $574.17. In the petition, in order to safeguard the property during the pendency of the litigation, respondent also requested the court to protect their interest in the goods by ordering the issuance of a conservatory writ of sequestration directing the Constable to sequester those items of movable property which had previously been sold to petitioner (App. 3-4). In support of the petition, respondent submitted an affidavit by its credit manager who stated, under oath, that he had reason to fear that the defendant would "encumber, alienate or otherwise dispose of the merchandise described." (App. 3-4). On the same day, February 2, 1972, on an *ex parte* basis, respondent's petition and the supporting affidavit were presented to and reviewed by Judge Arthur J. O'Keefe in the First City Court for the City of New Orleans (App. 5). After making an independent determination as to the sufficiency of respondent's petition and affidavit, Judge O'Keefe ordered that a writ of sequestration be issued and directed the Constable to sequester and take into his possession the specified articles of merchandise (App. 5). In addition, as a condition of the issuance of the writ of sequestration Judge O'Keefe required that the plaintiff furnish a bond in a face amount approximately 50% in excess of the purchase price of the property, and such a bond was posted (App. 5).

Thereafter on the same day, February 2, 1972, the Deputy Clerk of the First City Court issued a citation addressed to petitioner and a writ of sequestration addressed to the Constable of the First City Court (App. 9-12). The writ directed the Constable to sequester the specified movable property. On the next day, February 3, 1972, the citation and the writ were received by the Constable's office together with the petition, the affidavit, the order and the bond (App. 11; Record, hereinafter "R.", 5).

Despite the claimed fundamental importance of factual issues relating to the sequence of the notice and the sequestration, there is considerable uncertainty as to these events in the record and in the proceedings below.[1] Originally, when the petitioner served his motion to dissolve the writ of sequestration, he contended that the property was seized by the Constable on February 7, 1972 and that he was not given notice of the pending litigation and the sequestration until that day (*e.g.*, App. 13-14). Throughout the history of this litigation petitioner has always maintained the same position.

Now for the first time in these proceedings, petitioner has significantly altered his story. Petitioner now claims on this appeal that it was not on February 7, but rather on February 18, some eleven days later, that the Constable served on petitioner the citation, the petition, and the writ of sequestration and seized the goods (Br. p. 4). In support of this new factual argument, petitioner has submitted

1. One minor example of such uncertainty is that, contrary to petitioner's assertion (Petitioner's Brief, hereinafter "Br.", p. 4), there is no evidence in the record that the citation and petition were served on petitioner at his residence.

copies of certain documents in an appendix to his brief. These documents would appear to establish that the sequestration by the Constable of the petitioner's goods did not take place until February 18. Though the new documents may support petitioner's claim of "a delay between the authorization of the seizure and the actual seizure" by the Constable (Br. p. 7), petitioner offers no support in the record for the proposition that the service of the citation, petition and writ took place at any time other than February 7. Indeed, the return of the Constable suggests that on February 7, respondent's citation and petition were served on petitioner at his domicile by substituted service, by service of a copy of the citation and petition on Mrs. Mitchell (R. 5, quoted at p. 17, *infra*). Thus the record in this case would appear to indicate that notice was first given petitioner on February 7, some eleven days prior to the time that the goods were seized (R. 5). Neither the parties nor the courts below have as yet addressed themselves to this discrepancy regarding the key operative dates. Indeed the first reference to this discrepancy in any document filed in this case appears in petitioner's brief on this appeal (Br. p. 4, n.2). Consequently, from the record in this case it is not possible to determine the actual sequence of events.

After the Constable's sequestration of the property, whatever the date in fact may have been, though petitioner could have posted a bond[2] to obtain the release and return of the goods, he did not do so. Not until March 3 did

2. The amount of the bond required would have been one and one-quarter the amount of the claim or one and one-quarter of the value of the property to be seized, whichever was lesser. La. Code Civ. Proc. Ann. art 3508 (West 1961).

petitioner commence a proceeding to challenge the propriety of the sequestration of the goods, by moving in the First City Court for the City of New Orleans to dissolve the writ of sequestration. In that motion petitioner unequivocally stated "On February 7, 1972, defendant's stove, refrigerator, and electric wash tub were seized pursuant to said writ of sequestration." (App. 13). In such motion, petitioner did not deny that he owed the money, nor that he was in default. Moreover, petitioner did not assert that he had any defense to the underlying claim on which the issuance of the writ of sequestration was predicated (App. 13). Significantly, he did not contest respondent's assertion of fear that petitioner would conceal or dispose of the property (App. 13-14). Rather petitioner asserted only (1) that the property seized was exempted from seizure under certain Louisiana statutory exemptions, La. Rev. Stat. §13:3881; and (2) that the seizure was in violation of the "Due Process Clauses of the Louisiana and United States Constitutions" (App. 13-14).

A hearing was thereafter held on the motion to dissolve, but not one scrap of evidence nor any testimony as to the manner of notice nor the relevant operative events of the sequestration and their sequence was introduced into the record by petitioner. Counsel for the respective parties entered into a joint stipulation to the effect that the vendor's lien did exist on the items sequestered (App. 16).

The court denied petitioner's motion to dissolve the writ of sequestration (App. 17). In its opinion, the court noted that the defendant was "experiencing severe financial difficulties." (App. 18). The court held that "the items seized

are not exempted from seizure in instances involving a Vendor's Lien and Privilege." (App. 19). The court observed that

> "* * * the Vendor's Lien and Privilege is a basic and essential right afforded a creditor under our law of Obligations. The right to provisional seizure is likewise a basic adjunct and necessary remedy to maintain and enforce the creditor's lien and privilege." (App. 19).

The court further held that "the provisional seizure enforced through sequestration was not a denial of due process and, in this instance, did not impinge upon defendant's constitutional rights." (App. 19). The court properly pointed out that "plaintiff insured defendant's right to due process by proceeding in accordance with Louisiana Law as opposed to any type of self-help seizure * * *" (App. 19).

Thereafter petitioner sought writs of prohibition, certiorari, mandamus, and review in the Louisiana Court of Appeal for the Fourth Circuit and asserted the same two grounds, namely that the property was exempt from seizure under the Louisiana statutory exemptions and that the sequestration violated the constitutional provisions. The Court of Appeal refused the writs and held that there was no "abuse of discretion or other error in the rulings complained of." (App. 20).

Thereafter the petitioner applied to the Supreme Court of the State of Louisiana for writs of prohibition, certiorari, and/or mandamus and review. The application was granted and the appeal heard by the Supreme Court of Louisiana, which affirmed the decision of the lower court. The Su-

preme Court concluded that the property seized was not subject to the statutory exemption under Section 3881 of Title 13 of the Louisiana Revised Statutes (App. 23-26). The Supreme Court further held that exemptions from seizure under a writ of *fieri facias* "were inapplicable to provisional remedies to assert privileges created by the Civil Code" and that such exemptions did not prevent seizure pursuant to a writ of sequestration (App. 25-26). As to the second part of petitioner's two-pronged attack on this sequestration, the court held that the rule announced in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) did not affect the result in the present case. The court held that the instant case fell within a clearly announced exception in *Fuentes, i.e.*, " 'cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods' " (App. 29), based upon the facts pleaded in the petition and affidavit requesting the issuance of the writ (App. 29). The court stressed the difference between the vendor's privilege and the common law conditional sale in that, under Louisiana law, a vendor's privilege is lost upon transfer of the property by the vendee (App. 30). The court further noted that the vendee has impliedly consented to the Louisiana vendor's right to preservation of the privilege (App. 29), and thus has implied knowledge of the limited nature of his continued right to possession after the purchase of movables upon credit (App. 29).

Thereafter petitioner moved for rehearing by the Supreme Court of Louisiana and that motion was denied on December 11, 1972, whereupon petitioner sought review in this Court by seeking a writ of certiorari.

Summary of Argument

This case involves a constitutional challenge to a centuries-old Louisiana statute. However the record on which this case comes before the Court is utterly confused. Petitioner is simply unable to support his claim of a constitutional violation by reference to evidence in the record.

Petitioner initially asserted that his goods were sequestered by the Constable on February 7, 1972 and that notice was not given until that date. Now on this appeal, relying upon unsworn, out-of-court statements in documents not admitted into evidence and not subjected to cross-examination, petitioner asserts that seizure did not occur until 11 days later. However, petitioner offers no proof either in the record or out of the record to support his contention that service of the citation and petition occurred at any time other than February 7. Where the record of the claimed constitutional violation is so unclear, this Court is being asked to make a constitutional ruling without an adequate development of the factual framework within which to evaluate the constitutional question. Because of the fundamental inadequacy of the record, the Court should vacate the writ of certiorari as improvidently granted.

This is not a case which involves a mistaken or unjustified deprivation of property. This is a case in which the petitioner can no longer assert even a colorable defense to the taking of his property. Petitioner has caused a hearing to be held to determine the propriety of the issuance of the writ of sequestration and the subsequent taking into custody of his movable property. At that hearing petitioner

had the opportunity to defend his right to continued possession and to assert all available defenses.

Under Louisiana law a vendor's privilege continues only as long as the underlying obligation is not extinguished. Petitioner now belatedly suggests that there may be defenses which might have the effect of extinguishing the vendor's privilege. However, petitioner has expressly conceded that there is a valid vendor's privilege as to this property. In so doing he has admitted that there are, in fact, no defenses.

Louisiana law places the burden of proof upon the party who sought the writ of sequestration. The respondent has met that burden of proof and has established that respondent was entitled to the issuance of the writ of sequestration. Return of this case for further hearing before a local court in Louisiana would serve no useful purpose, because a hearing as to the right to possession has been held, and that question has been finally decided against the petitioner.

The Louisiana law of sequestration and vendor's privilege are based upon the civil law and are related to no common law concept. The writ of sequestration is a conservatory writ designed to preserve and safeguard property during the pendency of a litigation.

Use of Louisiana's writ of sequestration was constitutionally permissible in this case in that it reflected a proper balancing of the relevant competing interests. Because a vendor's privilege may be easily extinguished by a vendee, a special situation arises in Louisiana when a vendee defaults and a vendor justifiably fears the loss of the vendor's privilege. Such a situation requires prompt

ex parte judicial action. Louisiana has a legitimate state interest in seeing to it that parties avail themselves of properly supervised state remedies rather than resort to the more perilous route of self-help. Louisiana law safeguards the interests of the vendee by requiring careful judicial scrutiny of the petition for a writ of sequestration and judicial evaluation of the probable merits for the issuance of the writ of sequestration prior to its issuance.

Where this Court has so recently reviewed and found constitutionally acceptable the substantially similar Louisiana remedy of executory process, this Court should affirm the decision of the lower court in the present case for the same reasons. *Ross* v. *Brown Title Co.*, —— U.S. ——, 93 S. Ct. 2388 (1973).

I

The centuries-old Louisiana sequestration statute should not be held unconstitutional in a case where the factual record is so patently unclear and inadequate.

Petitioner seeks a fundamental constitutional determination upon a centuries-old statute which has been relied upon throughout its history without constitutional challenge. This Court should be hesitant to upset such a statute in the absence of a clear showing of the alleged constitutional violation.

This Court has repeatedly expressed reluctance to render a potentially far-reaching decision in "view of ambiguities in the record." *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U.S. 231 (1960). Here it is the factual record which lacks sufficient clarity for the Court to be in a position to

render a proper decision. *Massachusetts* v. *Painten,* 389 U.S. 560, 561 (1968). The record in the instant case unfortunately reflects the problem noted in *Wainwright* v. *City of New Orleans,* 392 U.S. 598-9 (1968) (Fortas, J., concurring):

> "* * * the facts necessary for evaluation of the dispositive constitutional issues in this case are not adequately presented by the record * * *."

Accord, McClanahan v. *Morauer & Hartzell,* 404 U.S. 16 (1971); *Kimbrough* v. *United States,* 364 U.S. 661 (1961) (lack of "sufficient clarity" in record became apparent after "a more thorough consideration of the record than was afforded when the petition for certiorari was granted"). Because full examination of the record in this case now discloses its inherent confusion, as in the above-cited cases this Court should dismiss the writ of certiorari as improvidently granted.

The principal factual issues in this case are when the petitioner first learned of the citation and petition and when the petitioner's movable property was sequestered by the Constable. The record of this case is such that the court does not have the operative facts necessary for proper evaluation of the constitutional issues. The record is a meager one. There was no trial. There were no findings of fact. Moreover, the record is as confused as it is abbreviated.

In *Fuentes* v. *Shevin,* 407 U.S. 67, 91 (1972), this Court noted that there might be an exception where there existed a need for prompt action. Petitioner devotes a considerable portion of his brief to demonstrate that there was no need for prompt action in this case (Br. pp. 36-39). Having

presented this case before the Supreme Court of Louisiana on a record indicating that "prompt action" did take place and that there was no delay from the time of the issuance of the writ of sequestration to the time of the seizure, it is outrageous for petitioner to present the case to this Court on significantly different facts. Now for the first time petitioner endeavors to establish that there was a substantial time lag between the issuance of the writ and the seizure (Br. p. 7).

Petitioner himself recognizes the lack of clarity and certainty regarding these issues. The record on which petitioner brings this case to the Supreme Court is so uncertain that petitioner has gone outside the record in search of documentary evidence on which to attempt to secure a factual basis for the assertion that he has been deprived of a constitutional right. It goes without saying that had the petitioner believed that the present record sufficed, the petitioner would not have endeavored to rely upon non-record evidence to shore up his case.

The documents on which petitioner relies, in fact, introduce a significant amount of uncertainty as to the sequence of events from February 2 to February 18. This confusion in the record arises principally out of the fact that petitioner has now fundamentally changed his story at this stage of the case. Initially petitioner took the position that the petition, citation, and writ of sequestration were served upon him on February 7, and that February 7 was the date when his goods were taken into custody (App. 13). Now, significantly departing from his own earlier assertions, petitioner in this Court for the first time contends that it was not until February 18 that the

goods were sequestered by the Constable (Br. p. 4). Petitioner's brief now asserts that "further inquiry into the record has resulted in the discovery that the date of service and seizure was February 18, 1972." (Br. p. 4, n. 2).

Petitioner in an effort to support this proposition and bolster his case has gone far outside the record. Petitioner in this Court now relies upon documents, which though purporting to be public records, were not introduced into evidence and are not a part of the record of this case. (Br. appendix B and C).[3] These documents contain unsworn statements not subjected to cross-examination in any proceeding below and should not be considered. *New Haven Inclusion Cases,* 399 U.S. 392, 450, n. 66 (1970). Moreover, these new documents are equivocal and thus further muddy the waters in this case in which the record is already so unclear.[4]

The documents relied on for this new contention that service and seizure was on February 18 appear to support only the contention as to the date of seizure. Appendix C purports to document the taking of the property on February 18 and indicates the "date seized" as February

3. Petitioner has endeavored to embellish the meager record by using these new documents from outside the record to make the irrelevant argument that the goods have gone into the respondent's possession (Br. pp. 4, 19). The contention hardly deserves response, because under Louisiana law, the location of movable goods sequestered matters not. The keeper of the property, regardless of identity, has a fiduciary obligation to protect and preserve the property. *Bickham Motors* v. *Crain,* 185 So.2d 271 (La. App. 1966).

4. Thus, for example, the document which petitioner has offered as Appendix B to his brief is a document which states "Please Take Notice—That by virtue of writ of Sequestration issued in the above mentioned suit, *I have seized and taken into my possession* the following described property, [namely the property in this case]." (emphasis added). That document is dated February 3. Petitioner offers no explanation of the variance between this apparent February 3 date of seizure, and the February 18 date of seizure which he asserts.

18. As to service of the citation and petition in this lawsuit and notice of the prospective sequestration, this document is silent. On the other hand, Appendix B purports to be only a notice after seizure that the specified movable goods had been taken. Thus this new document does no more than support the claim as to the date of the sequestration of the goods. Consequently, petitioner's new documents do not tend to substantiate the contention that petitioner received notice of the instant litigation at any time other than February 7.

More significantly, there is evidence in the record tending to show that petitioner received notice of respondent's proceedings against him on February 7 by means of a substituted service (R. 5).[5] Petitioner acknowledges this possibility, but argues that if there were such notice, it was insufficient because it was not required by statute (Br. p. 8). Such an argument represents a funda-

5. One of the Constable's Returns stamped on the citation reads as follows:

"CONSTABLE'S RETURN:

"Received on *FEB 3 1972*
and on *FEB 7 1972*
"I served a true copy of the within citation and accompanying petition on *Lawrence Mitchell*
defendant herein serving same at his domicile *7611 Chef Menteur Hy. (Apt. A-10)* Street in the hands of *Mrs. Lawrence Mitchell (wife)*
person of SUITABLE AGE AND DISCRETION RESIDING therein as a member of his domiciliary Establishment. Defendant being absent at time of said service. All these facts I learned by interrogating said person.

"Deputy Constable"

(Record 5). Though this return has been crossed out, it tends to support petitioner's original assertion that he was first notified of the proceeding on February 7.

mental departure from the case presented to the Louisiana Supreme Court. Furthermore, the new documents relied on by petitioner cast no light whatsoever on this clear suggestion in the record of notice by substituted service.

Petitioner now seeks to abandon his original claim that he received notice and that the goods were seized on February 7. However, petitioner offers this Court no clear explanation of the evidence which led him in the first instance to conclude that February 7 was the date on which these two events occurred, nor does petitioner offer any convincing reason why he now rejects his original basis for having asserted that date in the first instance.

The question that petitioner cannot resolve, despite his resort to documents outside the record, is when and in what manner petitioner was first served with notice of these proceedings. Petitioner's assertion that the citations and petitions are served at the time of the seizure is based neither on evidence nor citation to the record (Br. p. 20). If petitioner was correct initially in asserting that February 7 was the date of service, then petitioner had ample opportunity, an 11-day period, within which to obtain a hearing to dissolve the writ[6] and to prevent the sequestration of the goods, which he claims did not take place until February 18.

Because this factual issue has been raised for the first time in the Supreme Court, respondent has been deprived of an opportunity to explore the reasons for the claimed

6. Equally open to petitioner during such an interim may have been the route of injunctive relief. La. Code Civ. Proc. Ann. art. 3601 (West 1961).

delay in service of process and seizure of the movable property.[7]

Petitioner's approach to the constitutional issues on this record makes it abundantly clear that what is sought from this Court is an advisory opinion. In effect, petitioner asks the Court to review the statutes, without regard to the facts and the record of this particular case.

Whatever the sequence of events, the record in this case is not an adequate record on which the Court may intelligently assess the claimed constitutional issues, and accordingly the Court should vacate the writ of certiorari as improvidently granted.

II

Where there was a determination below adverse to petitioner's claim to continued possession of movable property, petitioner can assert no injury to himself for failure to have had a prior hearing.

Petitioner asserts that he has been deprived of property without having had a proper prior hearing. This case however, as contrasted with *Fuentes, supra,* involves neither a mistaken, nor an unjustified deprivation of property, nor the possibility of one. Rather the petitioner has no defense whatsoever to the taking of his property. A full and fair hearing brought on by petitioner has already been

7. Respondent has been foreclosed from inquiring into this issue to determine, for example, whether petitioner was endeavoring to avoid service of process and to avoid payment of his just obligations, which fact might tend to evidence respondent's need to have the movable property sequestered. Efforts on the part of the petitioner to avoid service of process, of course, would bear upon respondent's fears as to the continued security of their vendor's privilege.

held to determine the rights of the parties with respect to the issuance of the writ of sequestration and the taking into custody of the movable property. Petitioner appeared and had the opportunity to assert his right to possession of the goods and the dissolution of the writ of sequestration under any theory of law he chose. He has been heard and the issues have been determined against him.

Thus, because of the absence of a genuine controversy, this case comes before the Court with a fundamental jurisdictional defect. *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 116 (1920). Of course, a cause may become moot in part if only certain issues alone have been irrevocably disposed of. ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §279 (2d ed. Wolfson and Kurland 1951). This Court stated in *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971):

> "Early in its history, this Court held that it had no power to issue advisory opinions, *Hayburn's Case*, 2 Dall. 409 (1792) * * * and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. * * * To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * *' "

This Court has repeatedly expressed its reluctance to pass upon the constitutionality of a statute unless a decision of the precise constitutional issue is a necessity in that

case. *Board of Regents* v. *Roth,* 408 U.S. 564, 574 (1972) (issue not before the Court). Likewise in *Sanks* v. *Georgia,* 401 U.S. 144 (1971) after the right to possession of premises had been resolved, there remained no controversy, the case was moot, and the appeal dismissed. *Accord, Hernandez* v. *European Auto Collision, Inc.,* —— F.2d —— (2d Cir. June 29, 1973) (mechanic's lien; failure to dispute underlying obligation rendered moot a constitutional challenge to detention provisions of New York Lien Law). This Court did not allude to this issue in *Jennings* v. *Mahoney,* 404 U.S. 25 (1971), where a claimed deprivation of a driver's license without a prior hearing was affirmed based upon a subsequent hearing.

Even in cases involving procedural due process where a constitutional decision is necessary, the Court has expressed its reluctance to do more than decide only those narrow constitutional issues before it. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971); *United States* v. *Kras,* 409 U.S. 418 (1973).

The petitioner has by his own action mooted this case. It was petitioner, himself, who brought this matter before the Louisiana trial court for a hearing which determined against him the issue of his right to continued possession of the property. Since the issue has been determined against the petitioner, it would serve no purpose at all to remand this case for further hearing at the trial court level. Because the determination has been made, petitioner's claim that his rights have been violated is asserted only as an abstract proposition.

At the hearing to dissolve the writ of sequestration, had petitioner's defenses been justified, petitioner had the

right to prevail before the local court and to have the writ dissolved. Article 3506 governs the motion made by petitioner to dissolve the writ and imposes upon a plaintiff a burden of proof requiring him to prove "the grounds upon which the writ was issued." La. Code Civ. Proc. Ann. art. 3506 (West 1961). Respondent met that burden and has established that the writ of sequestration was properly issued (App. 17).

Though petitioner argues that he was not entitled to go into the merits of the claim against him upon the hearing on the motion to dissolve the writ (Br. p. 24),[8] it is unquestionably clear that at the hearing on that motion the petitioner was entitled to raise any issue bearing upon "the grounds for the auxiliary remedy," *i.e.*, the issuance of the writ. La. Code Civ. Proc. Ann. art. 3506, Comment *c*. While it is not open to the vendor on a motion to dissolve the writ of sequestration to secure a final adjudication of the underlying claim (La. Code Civ. Proc. Ann. art. 3506, 3510), the vendee has the right at that hearing to raise all issues relevant to the propriety of the issuance of the writ of sequestration. *See, e.g., Bates-Crumley Chevrolet Co.* v. *Brown*, 141 So. 436 (La. App. 1932) (issue

8. This Court has previously considered a similar argument that a party was not permitted to raise defenses on a hearing as to possession. In *Lindsey* v. *Normet*, 405 U.S. 56 (1972) under Oregon law the hearing was limited to the sole issue of whether a tenant had paid the rent. Plaintiff contended that the statute denied him due process of law by not allowing him to raise affirmative defenses. This Court rejected the argument and held that the tenant's rent obligation and duties imposed on a landlord were completely independent as a matter of Oregon real estate law. Likewise if defenses now asserted by petitioner could not have been heard on the hearing to dissolve the writ, the defenses would be independent as a matter of Louisiana law and thus constitutionally irrelevant under *Lindsey*, *supra*. If the defenses are not irrelevant, as shown pp. 23-25, *infra*, then they should have been raised at the hearing to dissolve the writ.

of payment decided on motion to dissolve); *Montagne* v. *Tinker*, 197 So.2d 154, 157 (La. App.), writ refused, 250 La. 916, 199 So.2d 921 (1967). Of necessity, the trial court made a finding on the validity of the issuance of the writ of sequestration. Though the petitioner may assert that he intended to try only the constitutional issue at the hearing below, the finding under Louisiana law was not limited to the constitutional issue. After having heard the petitioner's arguments, the trial court of necessity determined that the grounds for the taking of the property by the Constable from the possession of the petitioner had been established (App. 17; La. Code Civ. Proc. Ann. art. 3506).[9]

In order to meet the burden of establishing that a writ of sequestration was properly issued, a vendor must establish the following: (1) the existence of a valid vendor's lien; (2) the existence of a debt arising in connection with sale on credit of particular goods; (3) a default by the vendee in payment for those goods permitting an action to be brought; (4) the absence of defenses extinguishing the vendor's privilege; (5) the vendee's actual possession of the goods; and (6) the power of the defendant to conceal, dispose of, or waste the property. La. Code Civ. Proc. Ann. art. 3501, 3506, 3571 (West 1960); La. Civ. Code Ann. art. 3227 (West 1960).

Petitioner misperceives the extent to which challenge may be made to the issuance of a writ of sequestration at a hearing upon a motion to dissolve the writ. A writ of

9. This case differs significantly from the situation in *Fuentes*, *supra*, because there a significant property interest remained at stake. In *Fuentes* there had not been a hearing on the merits of the taking. The Court in *Fuentes* stated "It is enough that the right to continued possession of the goods was open to *some* dispute at a hearing. * * *" *Fuentes* v. *Shevin*, 407 U.S. at 67, 87, fn. 17 (1972). Here no such dispute remains.

sequestration may be issued "when one claims the ownership or right to possession of property * * * or a privilege thereon * * *." La. Code Civ. Proc. Ann. art. 3571 (West 1961).[10] The existence of such a privilege is governed by Article 3227 of the Louisiana Civil Code which accords a privilege to one "who has sold to another any movable property, which is not paid for * * *." In short, the privilege is extinguished upon payment of the debt owing the vendor. It is but to state the obvious that absent a debt to the vendor, there can be no vendor's privilege. Thus in the event that the property is paid for or there is no longer any sum owing to the vendor, there is no underlying privilege upon which the vendor can base his petition to sequester the property. *Bates-Crumley Chevrolet Co.* v. *Brown*, 141 So. 436 (La. App. 1932) (acceptance of a note extinguished the privilege).

The Louisiana case law is completely in accord with the foregoing analysis. Thus, in *Louisiana State Rice Milling Co., Inc.* v. *Potter*, 179 La. 197, 153 So. 690 (1934) the vendee properly raised the defense that there had been no sale. In *Herbert* v. *Hurwitz Mintz Furniture Co.*, 21 So.2d 638 (La. App. 1945), issuance of the writ was challenged on the ground that the debt was no longer due and payable. *Rene Implement Co.* v. *Perrin*, 178 So. 181, 186 (La. App. 1938), involved a challenge to the issuance of the writ on the ground that the supporting affidavit was false. *Accord, Cottonport Bank* v. *Dunn*, 21 So.2d 525 (La. App.

10. This Court in *Fuentes*, 407 U.S. at 97, held that the hearing to determine the right to possession of the goods requires that the probable validity of the underlying claim against the debtor be determined. This determination is implicitly required by the statutes governing the issuance of the writ of sequestration and the use of the motion to dissolve it. La. Code Civ. Proc. Ann. art. 3506 (West 1961).

1945) (appeal of denial of motion to dissolve writ; remand for evidence as to manner of plaintiff's acquisition of note and the arrangement among the parties). See also *American Steel Building Co.* v. *Brezner,* 158 So.2d 623 (La. App. 1963). In short, any meritorious defense may be used to attack sequestration at the hearing to dissolve it.

Here the petitioner had the right at that hearing to raise the issue of whether in fact there had been a mistaken deprivation, but he could show no mistaken deprivation. At the hearing petitioner did not contend that he did not owe the money, nor did he contend that he was not in default (App. 13-14, 16). He did not assert that there was any dispute between him and the respondent (App. 13-14, 16). He did not assert that there was any defense available to him which might defeat the claim of the respondent (App. 13-14, 16).

Even more important is the concession which the petitioner has made on the record in this case. At the hearing on the motion to dissolve the writ, the petitioner conceded that in fact there was a valid vendor's lien on the goods. By making such a concession the petitioner has implicitly admitted that there is no valid defense to upset the claim against him and his property, because under the law of Louisiana, a vendor's privilege exists only so long as the vendor is entitled to be paid. *Bates-Crumley Chevrolet Co.* v. *Brown,* 141 So. 436 (La. App. 1932); YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE, PROPERTY §§56, 106 (1967).

At the hearing on the motion to dissolve the writ petitioner had ample opportunity to advance legal theories upon which it might be contended that the vendor's privi-

lege had been extinguished. Because petitioner has not raised any such issues and has conceded that vendor's privilege has not been extinguished, the defenses so belatedly contrived and asserted for the first time in this Court are shown to have no substance.[11]

Since petitioner has made such a concession and since the local court has made the express judicial determination that respondent demonstrated a justifiable need to cause petitioner's goods to be sequestered and that petitioner is not entitled to possession of the goods, a return of this case for a hearing in the local court in Louisiana would be a nullity.[12] In short, the question petitioner seeks to have reviewed is wholly abstract. To make a determination in this case that the Louisiana law of sequestration is uncon-

11. Petitioner may well argue that, at a new hearing at the trial court level regarding petitioner's right to continued possession of the goods, he would raise defenses which were not raised at the initial hearing. He might argue that at the initial hearing the only defenses raised related to the statutory exemption of the property and the constitutional right to notice and hearing. But what this Court said in *Fuentes* was that a party was entitled to an opportunity for a hearing. Petitioner has had that opportunity for a full hearing, and at the hearing could have raised the defenses he now alludes to for the very first time. There is no reason to require a second hearing to consider the same ultimate issue raised at the first, namely, the petitioner's right to possession of the goods. The right to raise those additional hypothetical defenses is foreclosed to him. Since petitioner made an intelligent and knowing choice of which defenses to raise at the possessory hearing, he can properly be held to have waived his right to raise other defenses. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

12. Petitioner may contend he is entitled to damages if the writ were dissolved. Such a question of damages is merely incidental to the primary issue. Where as here the main issue is moot, the peripheral question of potential recovery of damages or costs does not transform this case into one where there is an actual case or controversy. ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §279 (2d ed. Wolfson and Kurland 1951).

stitutional would be to render an advisory opinion, which would have no impact on the rights of the particular parties in this case.

III

There is no good reason to extend the rule in *Fuentes* to the Louisiana law of sequestration.

A. The Louisiana law, based upon the Civil Code and stemming from entirely different legal traditions, involves different legal concepts, and therefore should be accorded separate treatment.

The *Fuentes* case involved the common law writ of replevin. On this appeal, petitioner proceeds on the mistaken assumption that the ruling in the *Fuentes* case is automatically applicable to the Louisiana writ of sequestration. Such is not the case. A careful analysis shows that there are significant actual, historical and conceptional differences between the common law writ of replevin and the civil law writ of sequestration.

The following discussion demonstrates the fundamental underlying differences between the two types of procedures and the historical origins of the writ of sequestration in Louisiana so blatantly ignored by petitioner's brief.

The procedure of sequestration is a preliminary measure of interim security. Millar, *"Judicial Sequestration in Louisiana: Some Account of Its Sources."* 30 TUL. L. REV. 201 (1956) [hereinafter "Millar, *Judicial Sequestration*"]. One primary difference between the writ of replevin and the Louisiana writ of sequestration is that

the former is intended to establish the immediate right to possession, while the latter is not. Indeed, the very terminology used is illustrative of the differences: the writ of sequestration is a "conservatory writ". Johnson, *Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure*, 38 TUL. L. REV. 1 (1963) [hereinafter, "Johnson"]. The fundamental concept underlying the writ of sequestration is that it is exclusively intended to preserve property from waste or concealment, while a lawsuit is pending, for the mutual benefit of both the vendor and the vendee. Johnson, *supra*, at 3 (1963); Note *The Writ of Sequestration in Louisiana*, 5 LA. L. REV. 102 (1942). If the vendor prevails on the merits, then the judicial sale thereafter will yield greater proceeds, thus reducing any deficiency that the vendee would otherwise have to pay. If the vendee prevails on the merits, then he can be restored to his previous position by the award of damages sustained for loss of use of property, and counsel fees. La. Code Civ. Proc. Ann. art. 3506 (West 1961). The purpose of the writ of sequestration is the "express safeguarding of property as an end in itself * * *." See, Millar, *Judicial Sequestration* at 233.[13] The traditional notion of

13. To be sure, the Louisiana Code of Civil Procedure does now permit "release" of movable property to a plaintiff 10 days after the seizure of the property in the event that the defendant has chosen not to post the bond. La. Code Civ. Proc. Ann. art. 3507, 3576 (West 1961). But release of the property within the meaning of these provisions is quite limited. Title in the goods does not reside in the plaintiff under such circumstances. Indeed, only after a final judgment is obtained in the action can the property seized be sold to satisfy the claim. Louisiana Code of Civ. Proc. Ann., art. 3510 (West 1961). Furthermore, even after the property has been placed in the plaintiff's custody, the plaintiff is only the keeper or custodian of the goods, which are still in the constructive possession of the Louisiana courts. *See, Bickham Motors Inc.* v. *Crain*, 185 So.2d 271 (La. App. 1966).

sequestration does not involve taking property from one person and giving it to another, but rather the property is taken into legal custody to conserve it during the pendency of a dispute. Johnson, *supra* at 4.

By way of contrast the "ancient possessory action" of replevin is a method by which a determination of the right to possession may be immediately made. *Fuentes* v. *Shevin*, 407 U.S. 67, 79 (1972). Indeed, the historic remedy involved the taking of goods from the possession of one party by a sheriff and placing them in the possession of another party, 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 278-286 (1966).

While some Louisiana procedures draw upon common law ancestry (such as the law of attachment), the institution of the writ of sequestration "owes nothing to Anglo-American law, resting as it does upon principles finding their origin in the law of Rome," and its development excluded "the intrusion of Anglo-American ideas out of harmony with the system at large." Millar, *Judicial Sequestration*, at 227, 232. The institution of sequestration existed both in French and Spanish systems and derived originally from the Roman law. *Id.* at 206[14] The institution of ju-

14. Under Roman law, one determinant of its application was the circumstance that "the defendant possessor was a *persona suspecta*—an expression which seems to imply untrustworthiness not only from an economic standpoint but also from the standpoint of his moral character and habit of life. A second principal determinant * * * was the necessity of preserving the property in suit from waste or deterioration." Millar, *Judicial Sequestration*, at 206.

Later Roman law recognized sequestration to be available *inter alia*, "in the case of an action for the recovery of a movable, where the possessor is a *persona suspecta*, i.e., one who is without substantial estate and is open to the suspicion that he will dissipate the property."

[*footnote continued on next page*]

dicial sequestration became a part of the Louisiana Code of 1808, under the name of "judicial deposit". *Id.* at 216. That same author notes the existence of sequestration under Spanish law in New Orleans, citing the early case of *Pitot* v. *Elmes,* 1 Mart. (O.S.) 79 (1809); *Id.* at 217. When the property was taken from one party, it was put in the hands of sequestrators until the right of a particular party to possession was proven. *Id.*

In the Louisiana Code of Practice of 1825, judicial sequestration was defined as follows:

> "Art. 269. Sequestration is a mandate of the court ordering the sheriff in certain cases to take into his possession, and to keep, a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of the thing. This is what is properly called a judicial sequestration."

Millar, *Judicial Sequestration,* at 218-219.

In *Fuentes,* this Court observed that significant differences had developed distinguishing the modern law of replevin from its common law ancestry. 407 U.S. at 78. Replevin had originally been used by a tenant to obtain repossession of goods wrongfully taken from his posses-

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Later, it appears that sequestration of property was available among other situations in a controversy concerning movables where it was to be feared "that the parties will resort to violence and cause a decided disturbance of the peace." *Id.* at 208.

Likewise in the French law of the 16th and 17th centuries, according to Millar, citing French sources of that era, sequestration was in order where there was an action concerning the possession of things and it was to be feared that the parties would arrive at violence, and more particularly in regard to a movable where the possessor was suspected of changing its nature or being about to carry it off. *Id.* at 213-216.

sion by a landlord. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 367-369 (1956). That procedure was altered in more recent times to a procedure whereby one party could simply obtain possession of property from another. *Fuentes* v. *Shevin*, 407 U.S. 67, 79 (1972).

In straining to bring this case within the narrow boundaries of the *Fuentes* case, petitioner tries to show that the modern Louisiana law of sequestration likewise departs radically from its Roman, French and Spanish traditions in that a party need no longer plead his reason to fear that the movable property might be ill-treated or sent out of the jurisdiction (Br. pp. 24-25). Nothing could be more inaccurate. Sequestration "has remained in Louisiana law in substantially the same form from the beginnings, retaining * * * its 'essential integrity' and 'long-standing virtues' * * *." Johnson, *supra*, at 4. Petitioner fails to acknowledge that as long ago as 1826 a plaintiff could "obtain a sequestration *in all cases where he has a lien or privilege on property, upon complying with the requisitions of the law.*" La. Code Prac. art. 275(7), quoted in Millar, *Judicial Sequestration*, at 223. The tradition of this ancient provision is reflected in the law today. La. Code Civ. Proc. Ann. art. 3571 (West 1961).

The Constitution permits differences between the civil law and common law systems, and this Court has implicitly acknowledged those differences as necessitating different procedural systems. Yet, in effect, petitioner argues that the Louisiana statute must automatically be struck down because of its departure from procedural requisites applicable at common law. This Court, however, has recognized the flexibility of the Constitution to tolerate differences

among the fundamentally different types of legal systems and traditions.

Nearly a century ago this Court stated:

> "[W]hile we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe * * *." *Hurtado* v. *California*, 110 U.S. 516, 531 (1884).

Accord, Bianchi v. *Morales*, 262 U.S. 170 (1923) (where civil law summary foreclosure procedures were sustained against a challenge that they violated due process under the Fourteenth Amendment); *Missouri* v. *Lewis*, 101 U.S. 22 (1880).

Furthermore, in *Ownbey* v. *Morgan*, 256 U.S. 94, 110-112 (1921), this Court stated:

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement . . .
>
> * * *
>
> However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy."

Sequestration, an ancient conservatory remedy, with roots in the Roman, French, and Spanish law, "appears to have worked well and satisfied fully the demands made upon it. Few State procedural institutions, in our judgment, have experienced less complaint." Millar, *Judicial Seques-*

tration, at 232. In view of the different purpose and concept involved in the writ of sequestration and its civil law context it should be accorded different judicial treatment.

B. The Supreme Court of Louisiana properly held that the sequestration in the present case did not violate constitutional requirements of due process.

The petitioner proceeds from the mistaken assumption that *Fuentes* condemned all taking of property by a creditor remedy on an *ex parte* basis. But the decision in *Fuentes* was far more narrow. See generally Clark and Lander, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution,* 59 VA. L. REV. 355 (1973).

A number of creditor remedies have been considered by the Court and the remedies have not been held unconstitutional *per se.* This Court in *Fuentes* did not hold the writ of replevin unconstitutional. In *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969) this Court did not hold that garnishment was unconstitutional. In *Ross* v. *Brown Title Company,* 356 F.Supp. 595 (E.D.La.), *aff'd.* —— U.S. ——, 93 S.Ct. 2388 (1973) this Court affirmed the district court decision upholding the constitutionality of the Louisiana creditor remedy of executory process. In *D. H. Overmyer Co.* v. *Frick Co.,* 405 U.S. 174 (1972) this Court upheld the use of the cognovit note and execution on such a note.

As the Supreme Court in such cases did not hold that use of such creditor remedies was unconstitutional, use of the writ of sequestration is likewise not unconstitutional

per se. In essence, *Fuentes* requires that the rights of a debtor be adequately safeguarded by the State prior to issuance of a writ and seizure of the goods. The Court in *Fuentes* stated:

> "We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication." 407 U.S. at 96-97.

This standard has been more than adequately complied with in this case, because prior to the issuance of the writ, respondent was obliged to submit its petition, affidavit, and bond to the court, for the court's scrutiny.[15]

Where as here, there is an important state interest involved, *i.e.,* Louisiana's centuries-old vendor's privilege, the State may engage in a limited balancing process. Because petitioner does not like the manner in which the State's balancing has come out, petitioner jumps to the unwarranted conclusion that in effect no balancing is permitted by the State (Br. pp. 12-13), even though considerable differences from those in the common law jurisdiction are here present.

The balancing engaged in by the Louisiana Supreme Court took into account all the relevant interests, not just

15. Of course, after the issuance of the writ, respondent was obliged to bear the burden of proof for its issuance or answer in damages for the improper issue of the writ. La. Code Civ. Proc. Ann. art. 3506 (West 1961).

the one that the petitioner thinks ought to be included, and the court properly concluded that the petitioner was not deprived of due process of law.

This Court has stated that:

> "* * * consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961).

Analysis of the threefold interests in the proper use of sequestration, that of the State, the vendee, and the vendor, is instructive. Regarding the use of the vendor's privilege and the writ of sequestration, Louisiana has a legitimate state interest in seeing that private disputes are resolved through the orderly process of law and without resort to self-help with its unlimited potential for violence and bloodshed. Obviously, Louisiana has a significant interest in maintaining the public peace within its boundaries. One means of maintaining public peace is by discouraging the use of extra-legal self-help. 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 278 (1966); *see* n. 14 *supra*. Indeed, Chief Justice Burger has said in *Rosenfeld* v. *New Jersey*, 408 U.S. 901, 902 (1972) (dissenting opinion):

> "The important underlying aspect of these cases goes really to the function of law in preserving ordered liberty. Civilized people refrain from 'taking the law into their own hands' because of a belief that the government, as their agent, will take care of the problem in an organized, orderly way * * *."

Resort to self-help is no longer an abstract question. Though the issue is not settled, a number of courts have

recently held that the resort to the use of self-help does not violate the constitutional requirements of the Fourteenth Amendment. *See, e.g.*, Justice White's dissent in *Fuentes* v. *Shevin*, 407 U.S. 67, 102 (1972); *Brown* v. *United States National Bank*, 509 P.2d 442 (Ore. 1973); *Pease* v. *Havelock National Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Kirksey* v. *Theilig*, 351 F.Supp. 727 (D. Col. 1972); *Oller* v. *Bank of America*, 342 F.Supp. 21 (N.D. Cal. 1972); *Messenger* v. *Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A. 2d 402 (1972); *Greene* v. *The First National Exchange Bank of Virginia*, 348 F.Supp. 672 (W.D. Va. 1972); *McCormick* v. *First National Bank*, 322 F.Supp. 604 (S.D. Fla. 1971); *Brinkley* v. *Northside Motors*, 42 U.S. L.W. 2115 (Fla. Sup. Ct. July 31, 1973); *contra*, *Adams* v. *Egley*, 338 F.Supp. 614 (S.D. Cal. 1972), appeal docketed No. 72-1484 *sub nom. Adams* v. *Southern California First National Bank* (9th Cir.); *Michel* v. *Rex-Noreco, Inc.*, 2 CCH Pov. L. Rep. ¶16,972 (D. Vt. Nov. 1, 1972); *Boland* v. *Essex County Bank and Trust Co.*, 42 U.S.L.W. 2116 (D. Mass. Aug. 15, 1973). The Louisiana Supreme Court must have been mindful of the trial court's observation (App. 19) that judicial supervision of the use of the writ of sequestration affords the vendee considerable more protection than a vendor's resort to self-help. Indeed, it has been noted that

> "the participation of a State official increases the likelihood that the recovery would be conducted in an orderly and peaceable fashion, and reduces the likelihood that the wrong article would be seized or that the debtor's opportunity to get his item back would be impeded or made unreasonably difficult." Hale, *The Direction of Litigation in the Consumer Credit Field*, 28 Bus. Law. 639, 650 (1973).

Of fundamental concern in *Fuentes* was the protection of a debtor from the improper invocation of state power by a creditor. However, Louisiana's prior impartial judicial scrutiny of the application for the writ of sequestration affords the vendee sufficient protection against wrongful or mistaken deprivations. The vendee's interest is more than adequately protected by a disinterested judge who must carefully review the adequacy of the assertions presented in the petition seeking the writ of sequestration.

Louisiana's control of the use of its power in this case is quite different from the situation in *Fuentes* where the Court stated:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark." 407 U.S. at 93.

Louisiana has special safeguards surrounding the use of its writ of sequestration which differ significantly from procedures involving replevin in other states. Note, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 86, n. 7 (1972).[16] The Louisiana Supreme Court in examining its closely-related executory process statute contrasted its procedures with those in *Fuentes*:

> "The Florida statute authorized the issuance of the writ of replevin by a clerk of court, upon the

16. However, *Wheeler* v. *Adams Company*, 322 F.Supp. 645 (D. Md. 1971) discusses a replevin situation where the writ may be issued only after a showing before a judge.

creditor's unsupported allegation that he was entitled to the writ, with actual dispossession of the debtor immediately upon service of the writ.

"The Pennsylvania statute authorized the issuance of the writ of replevin by a prothonotary, upon the plaintiff's unsupported allegation that he was entitled to the writ, with actual dispossession of the debtor immediately upon service of the writ.

"Among the objectionable features of the statutes identified in the decision was the issuance of the writ of replevin by one not a state official, its issuance solely upon the ex parte allegation of the creditor that he is entitled to the goods seized, the omission of notice to the debtor, and the denial of an opportunity to be heard prior to actual dispossession.

"An examination of Louisiana procedures points up valid distinctions between them and those of Florida and Pennsylvania. A writ * * * in Louisiana is issued by a judge of a court of proper venue. To justify the issuance of the writ, the plaintiff must make a proper showing to the reviewing judge." *Buckner* v. *Carmack*, —— La. ——, 272 So.2d 326, 329-30, cert. filed 42 U.S.L.W. 3006 (April 10, 1973), U.S. App. Pndg.[17]

17. In addition, Louisiana safeguards the rights of the vendee with other requirements not found in Pennsylvania:

"the Pennsylvania law does not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property";

"The party seeking the writ is not obliged to initiate a court action for repossession"; and

"he (the party seeking replevin) need not even formally allege that he is lawfully entitled to the property * * *". 407 U.S. at 77, 78.

Louisiana requires an action to be commenced, a hearing on the merits, and that the party allege he is entitled to the movable property, as well as the requirements discussed in the text, *infra*. La. Code Civ. Proc. Ann. art. 3501, 3510, and 3571 (West 1961).

Likewise the three-judge federal court in *Ross* v. *Brown Title Co.*, 356 F.Supp. 595, 598 (E.D. La.), *aff'd.* —— U.S. ——, 93 S.Ct. 2388 (1973), noted the judicial supervision required prior to summary seizure pursuant to Louisiana's *ex parte* executory process, and this Court affirmed.

Before a writ of sequestration may be issued, the petition, affidavit, and bond must be submitted for review to a judge of the local court.[18] Article 3501 delineates the prerequisites for the issuance of the writ of sequestration:

> "A writ of attachment or of sequestration shall issue *only* when the *nature of the claim* and the *amount thereof*, if any, and the *grounds relied upon* for the issuance of the writ *clearly appear* from *specific facts shown by the petition verified* by, *or by the separate affidavit* of, the petitioner, his counsel or agent." La. Code Civ. Proc. Ann. art. 3501 (West 1961) (emphasis added).

Only after the Court has reviewed the papers and made an independent determination that the requirements for the issuance of the writ of sequestration have been met is the writ of sequestration issued.

> "Strict application of the rules established for the issuance of conservatory writs has been uniformly required by the Courts in the past. It is implicit in those remedies that they should not be availed of unless the

18. Petitioner's argument to the effect that the issuance of the writ may be performed by a mere clerk outside Orleans Parish (Br. pp. 19, 43), simply ignores the recent case law to the contrary. *Wright* v. *Hughes*, 254 So. 2d 293, 297 (La. App. 1971), on an appeal from Jefferson Parish, holds that a writ of sequestration may not be issued unless specific facts are alleged in the verified petition *"in order that the issuing judge can properly evaluate the grounds."* *See also, Buckner* v. *Carmack, supra* (executory process must be issued by judge).

conditions which permit them exist." *Hancock Bank* v. *Alexander*, 256 La. 643, 237 So.2d 669, 672 (1970).[19]

Accord: *Mathe* v. *Mathe*, 177 La. 579, 148 So. 884 (1933). *See generally*, Johnson, *Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure*, 38 TUL. L. REV. 1 (1963). This is not a case in which state action against property in the hands of another results solely from a creditor's "own belief in his rights." *Fuentes* v. *Shevin*, 407 U.S. 67, 83 (1972).

Unless specific facts meeting the grounds for issuance of the writ are clearly set forth in the verified petition, the judge may not issue the writ. *Wright* v. *Hughes*, 254 So.2d 293, 296-97 (La. App. 1971); *Hancock Bank* v. *Alexander*, 256 La. 643, 237 So.2d 669 (1970). "The Louisiana Supreme Court holds that the allowance or disallowance of sequestration is a matter of judicial discretion." *J. C. Trahan Drilling Contractor, Inc.* v. *Sterling*, 335 F.2d 65, 66 (5th Cir. 1964). *Accord*, *State ex rel. Knighton* v. *Derrybery*, 188 La. 412, 177 So. 256, 257 (1937); *Bogalusa Ice Co.* v. *Moffett*, 188 La. 598, 177 So. 679, 681 (1937); *Succession of Pavelka*, 157 La. 480, 102 So. 579, 580 (1924); *Barrow* v. *Duplantis*, 147 La. 461, 85 So. 205, 206 (1920); *Dickinson* v. *Texana Oil Company*, 144 La. 489, 80 So. 669 (1919).

The issuing judge must be presented with specific facts "in the verified petition in order that (he) can properly evaluate the grounds" for the writ. *Wright* v. *Hughes*, *supra*, at 297. If specific facts demonstrating adequate

19. If the requirements for issuance of the writ are not met, no subsequent amendment will render valid the writ improvidently granted, although the Louisiana Code Article 1154 adopts a modern approach permitting liberal amendments of pleadings. La. Code Civ. Proc. Ann. art 1154 (West 1960); *Hancock Bank, supra.*

grounds for the issuance are not set forth, it is reversible error for the Court to issue the writ. *Wright* v. *Hughes, supra.*

These cases abundantly demonstrate that it is incumbent upon the issuing judge to weigh the probable merits for the issuance of the writ. Petitioner's sole authority for the contrary proposition (Br. p. 18), is dictum in *Zion Mercantile Co.* v. *Pierce,* 163 La. 477, 112 So. 371 (1927). Prior and subsequent authority to the contrary demonstrate the trial court's considerable powers to supervise the issuance of the writ and otherwise protect a vendee.[20]

The third relevant interest, that of the vendor in Louisiana, warrants the particular attention of this Court. In Louisiana the vendee has an unusual power over goods as to which there is vendor's privilege. Under the law of Louisiana the vendee has the right to deprive the vendor without notice and without hearing of his rights to the goods by transferring the goods to third parties.

A review of the nature of the vendor's privilege may be of some assistance to this Court. As in the case of the writ of sequestration, the vendor's privilege is unknown to common law. Margolin, *Vendor's Privilege,* 4

20. Of course use of the writ of sequestration is hardly limited to low income consumer actions: *Queen City Broadcasting* v. *Wagenwest, Inc.,* 264 So.2d 336 (La. App. 1972) (corporation's radio broadcasting fixtures and equipment were sequestered); *Tucker & Schonekas* v. *Al Dohmann Chevrolet, Inc.,* 260 So.2d 99 (La. App.), *writ refused,* 261 La. 1048, 262 So.2d 37 (1972) (sequestration to secure attorney's fees against a car leasing corporation); *Talley* v. *Bradley,* 177 So.2d 624 (La. App. 1965) (trucks, bulldozers, scraping units, welding machines, and tool houses sequestered); *Hancock Bank* v. *Alexander,* 256 La. 643, 237 So.2d 669 (1970) (Cadillac automobile).

TUL. L. REV. 239 (1930). Unlike common law jurisdictions, the conditional sale does not exist in Louisiana law. DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE, 90-96 (1942). Title to goods sold passes to and from a vendor to a vendee immediately upon the taking of possession of goods by the vendee.

The vendor's privilege arises by statute pursuant to the provisions of Article 3227. La. Civ. Code Ann. art. 3227 (West 1960). The vendor's privilege is a distinct right of security in movable property for the unpaid balance of the thing sold. This privilege is a distinct property right. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE ON PROPERTY §§56, 106 (1967). As an accessorial thing, the vendor's privilege comes into existence between the parties (vendor and vendee) immediately upon transfer of movable property pursuant to a sale where not all of the purchase price is paid. *Id.* There is no need of recordation of a vendor's privilege on movables. *Id.* The privilege is created at the time of sale. *Id.*

The Federal Judiciary has previously recognized that the vendor's privilege under Louisiana law is one that is vital to the economy of that State:

> "The vendor's privilege, a special privilege on movables, is one of the most important and highest ranking security devices recognized in Louisiana. It has formed a cornerstone for credit in the economic structure of the mercantile trade in this State for centuries. It is not a spurious legal device to permit a debtor in failing circumstances to favor one creditor at the expense of another. Justice requires its recognition:

> 'As long as the price is not paid the sale augments the patrimony of the buyer at the expense of the vendor; the latter has impoverished himself, he has alienated his property and has not yet received anything in exchange. The vendor has thus gratuitously augmented the common pledge of the creditors of the buyer; the latter can be paid with the property sold without the vendor being paid, they enrich themselves at his expense, which is unjust. The new property therefore can be veritably acquired by the buyer only by the payment of the price; in French legislation which admits the immediate transfer of the title, the privilege is necessary to prevent an inequity.' Planiol, supra, No. 2608, p. 453. See, Carlin v. Gordy, 32 La.Ann. 1285 (1880)." *In re Trahan,* 283 F.Supp. 620, 627-8 (E.D. La.), *aff'd* 402 F.2d 796 (5th Cir. 1968), *cert. denied,* 394 U.S. 930 (1969).[21]

The vendor's privilege is of a fragile nature because of the vendee's ability to destroy it.[22] The vendor's privilege

21. See generally, DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE, 92-94 (1942). The importance of such a legislative policy favoring creditors who have added value to the property or estate of a debtor has been discussed with approval. Clark and Landers, *Snaidach, Fuentes, and Beyond: The Creditor Meets the Constitution.* 59 VA. L. REV. 355, 389 (1973). It is this precise legislative policy which has led the Louisiana legislature to have established the vendor's privilege (see App. 27).

22. Vendor's privileges on movables, as well as unrecorded privileges on immovables, are lost when the things sold are no longer in the physical possession of the purchaser. See La. Civ. Code Ann. art. 3227; *In re Trahan,* 283 F.Supp. 620 (E.D. La.), aff'd. 402 F.2d 796 (5th Cir. 1968), cert. denied 394 U.S. 930 (1969); *D. H. Holmes Co.* v. *Morris,* 188 La. 431, 177 So. 417 (1937); *Wilson* v. *Lowrie,* 156 La. 1062, 101 So. 549 (1924); *Dreyfous* v. *Cade,* 138 La. 297, 70 So. 231 (1915).

The vendor's privilege on a movable is also lost when the thing is resold by the purchaser in confusion with a mass of similar things.

[*footnote continued on next page*]

is extinguished upon sale or transfer of the movable by the vendee and consequently the vendor's right to recover the property is lost. DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE 119-124 (1942). Because the privilege is of such a precarious nature, the Supreme Court of Louisiana appeared quite concerned with the impact on the vendor's rights if notice to vendee prior to seizure were to be required (see App. 28-30). This is not merely an ordinary case, as petitioner suggests, involving only a creditor's interest in collecting his judgment (Br. pp. 44-45). Rather this case does present the Court with an extraordinary creditor interest. The unique features of the Louisiana privilege demand prompt action. This case presents the factual situation where it is alleged, in effect, that there is immediate danger that the debtor will destroy or conceal disputed goods (App. 29). In essence, if notice is to be given to the vendee prior to seizure, it is altogether too easy for the vendee to destroy the vendor's legal rights in the goods. The vendee's mere act of transferring the property from his physical possession would extinguish the privilege. YIANNOPOULOS, *supra* §108.

The vendor has several interests which must be considered. As noted in the dissent in *Fuentes,* 407 U.S. at 102, the vendor has an interest in preventing further abuse and deterioration of the property in which he has a substantial interest. The interests of the state and the vendor, though different, coincide in that each is interested in the

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See La. Civ. Code Ann. art. 3228; *Forrey* v. *Strange,* 158 La. 941, 105 So. 21 (1925); *Adams Mach. Co.* v. *Newman,* 107 La. 702, 32 So. 38 (1902).

The vendor's privilege on a movable is also lost if the thing sold has become "immovable by nature." *American Creosote Co.* v. *Springer,* 257 La. 116, 241 So.2d 510 (1970).

prompt resolution of the dispute. The courts should not be overburdened with duplicative, multiple proceedings concerning the same dispute. The only party whose interest is potentially adverse to the speedy resolution of the merits, is the debtor. Indeed in this particular instance, Mitchell has not availed himself of his opportunity to raise defenses going to the merits of the claim, nor did he avail himself of the opportunity to have the use of the goods restored to him and removed from the court's custody.

The Supreme Court has consistently held that the requirements of due process cannot be assessed by an automatic standard. In a concurring opinion in *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 162, 163 (1951), Justice Frankfurter discussed due process as follows:

> "* * * 'due process,' unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances. * * * [It] cannot be imprisoned within the treacherous limits of any formula.
>
> * * *
>
> The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another. * * * Whether the *ex parte* procedure to which the petitioners were subjected duly observed 'the rudiments of fair play,' *Chicago, M. & St. P.R. Co.* v. *Polt*, 232 U.S. 165, 168, cannot, therefore, be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is chal-

lenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

Given the unique power on the part of a vendee, it was appropriate for the Supreme Court of the State of Louisiana in this case to engage in a balancing of the respective interests of the State, the vendor, and the vendee and to conclude that the Fourteenth Amendment should not deprive the vendor of the right to take prompt judicially supervised *ex parte* action against the goods.

The Louisiana Supreme Court took note of an exception announced in *Fuentes* that there "may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods," 407 U.S. at 93, and properly held on the facts, this was such a case (App. 29). In arguing that the Louisiana law governing the issuance of the writ of sequestration does not explicitly require allegations of fear that the goods will be wasted (Br. pp. 41-43), petitioner completely misreads the decision of the Louisiana Supreme Court. In the petition for the writ the respondent has asserted their fear that petitioner would "alienate or otherwise dispose of" the merchandise (App. 3-4).[23] Attention to the motion to dissolve the writ shows that allegation has not been challenged or contradicted (App. 13-14). It was legitimately open to the Supreme Court of Louisiana to conclude

23. Petitioner does not address himself to the question of whether in light of *Fuentes*, the Louisiana court has implicitly held that such allegations are now required prior to the issuance of a writ of sequestration. *Cf. Buckner* v. *Carmack*, —— La. ——, 272 So.2d 326, 330 (1973), cert. filed 42 U.S.L.W. 3001 (1973), U.S. Appeal Pndg. (executory process).

in the light of the precarious nature of the vendor's privilege that the uncontradicted showing presented the very case in which prompt action was needed.

The Louisiana Supreme Court could properly find that in view of the rights which a vendee has with respect to movable property where there is a vendor's privilege, under the law of Louisiana there is a special need for permitting a vendor use of sequestration without notice and on a prompt basis. This should particularly be true where there could have been no doubt in the petitioner's mind that he was in default and that the failure to pay would result in having the goods seized by the vendor. As another court has recently stated, buyers are aware that "[i]f you don't pay, they take it away." *Almor Furniture & Appliances Inc.* v. *MacMillan,* 116 N.J. Super. 65, 66, 280 A.2d 862, 864 (1971). This was undoubtedly what the Supreme Court of Louisiana was referring to when it indicated that vendees unquestionably recognize that their right to possession of property is limited and that sequestration may be anticipated after default in payment for the goods (App. 29). Indeed, one recent study regarding repossession has shown that the debtors in default have had more than 25 contacts from the creditor prior to the seizure. Hale, *The Direction of Litigation in the Consumer Credit Field,* 28 Bus. Law. 639, 651-52 (1973).[24] Where there has been continued non-payment by the vendee, and where there have been repeated efforts to persuade the vendee to meet his just obligations, given the power that he has to

24. At least one court in refusing to apply the *Fuentes* rule to a claimed deprivation has held that a debtor in default has ample remedies available to him in the way of injunctive relief so as not to require a prior hearing. *Lucas* v. *Wisconsin Electric Power Co.,* 466 F.2d 638 (7th Cir. 1972) (utility cutoff).

deprive the vendor of his rights with regard to the goods, the right of sequestration now accorded the vendor under the laws of Louisiana should be permitted to continue.

Another unique Louisiana Civil law procedure with no genuine common law counterpart, executory process,[25] has been reviewed by this Court and has been upheld. In the case of *Fleitas* v. *Richardson*, 147 U.S. 538 (1893), the Court considered executory process issued on an *ex parte* basis and found nothing constitutionally defective with this procedure. *Accord, Levy* v. *Fitzpatrick*, 40 U.S. 167 (1841).

More significantly, this Court in the past term had occasion to reconsider the propriety of Louisiana executory process. The Court affirmed the district court decision holding that Louisiana executory process, which differs in no material respect from sequestration, fully complied with the requirements of the Fourteenth Amendment. *Ross* v. *Brown Title Co.*, 356 F.Supp. 595 (E.D. La.), *aff'd.* —— U.S. ——, 93 S.Ct. 2388 (1973). In *Ross* the sheriff's seizure resulted in a significant deprivation of property, *i.e.*, the alteration and significant diminution in the value of the real property owned. The Louisiana statute governing executory process, as does sequestration, extends to movable goods and to the vendor's privilege. La. Code Civ. Proc. Ann. art. 2631 (West 1960); McMahon, *The Historical Development of Executory Procedure in Louisiana*, 32 TUL. L. REV. 555 (1958). The only additional element not found in sequestration but required with executory procedure is a mere demand for payment by the clerk of the

25. *Buckner* v. *Carmack*, —— La. ——, 272 So.2d 326 (1973); McMahon, *The Historical Development of Executory Procedure in Louisiana*, 32 TUL. L. REV. 551 (1958).

court, though certain plaintiffs in *Ross* were not given such notice. La. Code Civ. Proc. Ann. art. 2639 (West 1960). The statute permits actual seizure by the sheriff of movable and much immovable property three days after a demand for payment, La. Code Civ. Proc. Ann. art. 2721 (West 1960), and a notice of seizure of the property is filed with the recorder of mortgages without prior notice to the debtor. *Buckner* v. *Carmack*, —— La. ——, 272 So.2d 326 (1973).[26] In the instant case, as in *Ross*, before respondent could take any action against petitioner's goods, respondent was required to submit an application to the scrutiny of a local trial court before the writ of sequestration could be issued (see pp. 39-41, *supra*). Since the sequestration statute here challenged accords a vendee the same safeguards as the Louisiana procedure so recently reviewed and upheld by this Court in *Ross*, it likewise should be upheld.

Petitioner seeks to upset the use in this case of the unique Louisiana writ of sequestration on arguments that represent "no more than ideological tinkering with state law." *Fuentes* v. *Shevin*, 407 U.S. 67, 102 (1972) (White, J. dissenting).

The law of Louisiana is *sui generis*. The Louisiana Supreme Court has recognized the need for a special rule regarding the vendor's privilege in that State. The Supreme Court of the State of Louisiana properly took into

26. As to a subsequent determination regarding the parties' rights to sell or dispose of the property, sequestration provides for notice and subsequent hearing on the merits of the claim, but with executory process such a hearing occurs only at the instance of the debtor. La. Code Civ. Proc. Ann. art. 3510, 2751 *et seq.* (West 1961).

account the respective interests of vendor and vendee in its balancing of the rights of the parties regarding the protection afforded under the United States Constitution, and its decision should not lightly be overturned.

Conclusion

For the reasons set forth above, this Court should vacate the writ of certiorari as having been improvidently granted, or in the alternative, should affirm the decision of the Supreme Court of Louisiana.

Respectfully submitted,

THOMAS J. O'SULLIVAN
14 Wall Street
New York, New York 10005

MARSHALL J. FAVRET
527 Hibernia Bank Building
New Orleans, Louisiana 70112

Attorneys for Respondent

Of Counsel:
ANTHONY A. SANTA BARBARA
WHITE & CASE

FAVRET AND FAVRET